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# IN THE SUPREME COURT OF THE UNITED STATES

46928
D.C.

OCTOBER TERM, 1941

No. 815

STATE TAX COMMISSION OF UTAH and OLIVER G. ELLIS, State Treasurer of the State of Utah, *Petitioners*,

vs.

ALVIN UNTERMYER, IRWIN UNTERMYER, and SAMUEL UNTERMYER, 2nd, Executors of the Estate of Samuel Untermyer, Deceased.

## PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF UTAH AND BRIEF IN SUPPORT THEREOF

GROVER A. GILES,
*Attorney General of Utah*

J. LAMBERT GIBSON,
GARFIELD O. ANDERSON,
*Counsel for Petitioners*

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# IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

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No.....

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STATE TAX COMMISSION OF UTAH and OLIVER G. ELLIS, State Treasurer of the State of Utah, *Petitioners*,

vs.

ALVIN UNTERMYER, IRWIN UNTERMYER, and SAMUEL UNTERMYER, 2nd, Executors of the Estate of Samuel Untermyer, Deceased.

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## PETITION FOR WRIT OF CERTIORARI

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TO THE HONORABLE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petition of the State Tax Commission of Utah and Oliver G. Ellis respectfully shows to this Honorable Court:

### I.

### SUMMARY STATEMENT OF MATTER INVOLVED

Petitioner State Tax Commission of Utah is a body politic created under and by the virtue of the Constitution and Laws of the State of Utah and is charged with the duty, among other things, of enforcing the provisions of Chapter 12, Title 80, Revised Statutes of Utah, 1933, and of collecting the estate taxes due thereunder (R. 11). Petitioner Oliver G. Ellis is the presently duly elected, qualified and acting State Treasurer of the State of Utah (R. 23).

Respondents (plaintiffs in this action originally, and hereinafter referred to as plaintiffs) are the duly appointed, qualified and acting executors of the estate of Samuel Untermyer, deceased (R. 10-11).

Samuel Untermyer died March 16, 1940, being at the time of his death a resident of and domiciled in the State of New York (R. 11). At the time of his death, Samuel Untermyer was the owner of 2,100 shares of the capital stock of the Union Pacific Railroad Company (R. 11). The certificates representing these shares of stock were in the possession of the decedent in the State of New York and the same certificates are now physically located in the State of New York in the possession of the executors of the estate of said decedent (R. 12). The shares of stock were recorded on the books of the Union Pacific Railroad Company in the name of decedent at the date of death (R. 12). Other than the ownership of the stock in question, the transfer of which petitioners claim as subject to tax under Chapter 12, Title 80, Revised Statutes of Utah, 1933, the decedent owned no property within the jurisdiction of the State of Utah.

The Union Pacific Railroad Company is a corporation organized and existing under and by virtue of the laws of the State of Utah (R. 12).

Petitioners claim and assert that the transfer at death of said shares of stock of the Union Pacific Railroad Company from said decedent is subject to tax under Chapter 12, Title 80, Revised Statutes of Utah, 1933. The State Tax Commission of Utah demanded payment of its estate tax upon such transfer as a condition precedent to the issuance of a waiver and consent to transfer such stock. Pursuant to such demand, the plaintiffs paid to the State Tax Commission of the State of Utah the sum of $8,059.06 which is the mathematically correct amount of tax computed under the Utah statutes (R. 13-14). The payment was made under protest (R. 13), and on September 30, 1941, plaintiffs filed a timely action in the Third Judicial

District Court of the State of Utah in and for the County of Salt Lake to recover said taxes paid under protest (R. 1-4). The allegations of the complaint included averments to the effect that the imposition of such a transfer tax by the State of Utah would violate the Fourteenth Amendment to the Constitution of the United States of America. This was the earliest opportunity at which a Federal question could be raised (R. 4). The case was submitted to the trial court and on January 22, 1941, the trial court rendered its memorandum decision in favor of plaintiffs and against your petitioners (R. 9-10). On March 25, 1941, findings of fact and conclusions of law were entered by the trial court containing, among others, a finding that the imposition of the tax in this case would violate the provisions of the Fourteenth Amendment to the Constitution of the United States (R. 15). Judgment was entered in the trial court pursuant to such findings of fact and conclusions of law (R. 15).

Appeal was duly taken to the Supreme Court of the State of Utah (R. 16) and on September 17, 1941, the Supreme Court of the State of Utah rendered its decision affirming that of the trial court (R. 17-22). (Utah, 116 Pac. (2nd) 926.) Judgment of the Supreme Court of the State of Utah pursuant to said decision was entered September 17, 1941 (R. 22).

The decision and judgment of the Supreme Court of the State of Utah were based solely upon the principle that the proposed imposition of the tax under the facts of the case at bar would violate the provisions of the Fourteenth Amendment to the Constitution of the United States of America (R. 17-22).

Petition for rehearing was duly and timely made to the Supreme Court of the State of Utah on the 14th day of October, 1941, and was denied by that Court on the 24th day of October, 1941 (R. 23).

This petition is for a review of the decision and judgment of the Supreme Court of the State of Utah. Said judgment

of the Supreme Court of the State of Utah is a final judgment of the highest court of the State of Utah in which a decision could be had.

II.

**JURISDICTION**

1. The date of the judgment to be reviewed was September 17, 1941 (R. 22). The date of the order denying petition for rehearing was October 24, 1941 (R. 23).

2. The Supreme Court of the State of Utah is the highest Court of law and equity in the State of Utah and the judgment or decree sought to be reviewed and reversed is a final judgment or decree of the Supreme Court of the State of Utah.

3. The Supreme Court of the State of Utah has decided a federal question of substance in a way not in accord with applicable decisions of this Court and has held the application of a statute of the State of Utah invalid on the grounds of its being repugnant to the Constitution of the United States of America. (Judicial Code, Section 237, as amended; 28 U.S.C.A., Section 344.)

4. The statute of the State of Utah involved is found in the volume entitled Revised Statutes of Utah, 1933, at page 920, Sections 80-12-2 and 80-12-3, and provides as follows:

Section 80-12-2:

> "A tax equal to the sum of the following percentages of the market value of the net estate shall be imposed upon the transfer of the net estate of every decedent, whether a resident or nonresident of this state: * * *."

Section 80-12-3:

> "The value of the gross estate of a decedent shall be determined by including the value at the time of his death of all property, real or personal, within the jurisdiction of this state, and any interest therein, whether tangible or intangible, which shall pass to any person, in trust or otherwise, by testamentary

disposition or by law of inheritance or succession of this or any other state or country, or by deed, grant, bargain, sale or gift made in contemplation of the death of the grantor, vendor or donor, or intended to take effect in possession or enjoyment at or after his death."

5. The entire record is before this Honorable Court on this petition for writ of certiorari which is made within the time limit prescribed by statute and the rules of this Court.

## III.

## QUESTION PRESENTED

The question presented in this action is whether the State of Utah may, without violation of the Constitution of the United States of America, levy and collect its estate tax upon the transfer at death of shares of stock in domestic Utah corporations, which stock was, at the time of death, owned by a decedent nonresident of and not domiciled in the State of Utah.

## IV.

## REASONS RELIED ON FOR ALLOWANCE OF WRIT

1. Petitioners respectfully present that the Supreme Court of the State of Utah has erroneously decided a federal question of substance in a way not in accord with applicable decisions of this Court in that the Supreme Court of the State of Utah has held in a final judgment that the State of Utah is barred by the provisions of the Fourteenth Amendment to the Constitution of the United States of America from assessing and collecting its estate tax upon the transfer at death of shares of stock in domestic Utah corporations owned by nonresident decedents at the time of death. Recent decisions of this Honorable Court have demonstrated that a tax under such circumstances is not violative of any provision of the Constitution of the United States of America. *Curry* v. *McCanless,* (1939)

307 U. S. 357, 83 L. ed. 1339, 59 S. Ct. 900; *Graves* v. *Elliott,* (1939) 307 U. S. 383, 83 L. ed. 1356, 59 S. Ct. 913; and other decisions treated in petitioners' brief in support of this petition for writ of certiorari.

2. The Supreme Court of the State of Utah has, by the decision herein referred to, held that a statute of the State of Utah is invalid in its application to the facts of the case at bar upon the ground that the statute was repugnant to the Constitution of the United States of America, and in so holding has misconstrued the Constitution of the United States of America and the applicable decisions of this Court.

3. The question of whether the state of incorporation may tax the transfer at death of shares of stock of domestic corporations owned by nonresident decedents at date of death is one of general importance and concern to the several states and to taxpayers. The question should be decided by this Court.

WHEREFORE, your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the Supreme Court of the State of Utah, commanding the said Supreme Court of the State of Utah to certify and to send to this Court on the day certain to be therein named a full and complete transcript of the record and all proceedings in the case entitled and numbered on the docket of the Supreme Court of the State of Utah: "Alvin Untermyer, Irwin Untermyer and Samuel Untermyer, 2nd, Executors of the Estate of Samuel Untermyer, Deceased, Plaintiffs and Respondents, vs. State Tax Commission of Utah and Oliver G. Ellis, State Treasurer of the State of Utah, Defendants and Appellants, No. 6359", to the end that said case may be reviewed and determined by this Court, as provided by law, that the judgment of the Supreme Court of the State of Utah in said cause be reversed by this Honorable Court and that your petitioners have such other and further

relief as to this Honorable Court may seem just and proper; and your petitioners will ever pray.

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*Attorney General of Utah*

J. LAMBERT GIBSON,
GARFIELD O. ANDERSON,
*Counsel for Petitioners*

## BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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### OPINION OF COURTS BELOW

The trial court rendered its decision on January 22, 1941 (R. 9-10) but the opinion is unreported. The opinion of the Supreme Court of the State of Utah (R. 17-22) is reported at ——Utah——, 116 Pac. (2d) 926.

### STATEMENT OF THE CASE

The facts of the case are set forth in the petition herein (see pages 1-4).

### JURISDICTION

The judgment of the Supreme Court of the State of Utah of Utah herein sought to be reviewed was entered on September 17, 1941 (R. 22). Petition for rehearing was denied by the Supreme Court of the State of Utah on October 24, 1941 (R. 23). The judgment of the Supreme Court of the State of Utah was rendered in a cause in which the validity, under the Fourteenth Amendment to the Constitution of the United States, of Sections 80-12-2 and 80-12-3, Revised Statutes of Utah, 1933, was directly involved.

The jurisdiction of this Court is invoked under Section 237 of the Judicial Code, as amended by the Act of February 13, 1925, c. 229, Sec. 1, 43 Stat. 937 (28 U.S.C.A., Sec. 344) and the Act of February 13, 1925, c. 229, Sec. 8, 43 Stat. 940 (28 U.S.C.A., Sec. 350).

### STATEMENT OF ERRORS

1. The Supreme Court of the State of Utah erred in applying the principles established by this Court in applicable decisions to the facts in this cause.

2. The Supreme Court of the State of Utah erred in its application of the Fourteenth Amendment to the Constitution of the United States to the facts in this cause.

3. The Supreme Court of the State of Utah erred in holding that the imposition of the Utah estate tax upon the transfer of shares of stock of domestic corporations of the State of Utah owned by nonresident decedents was in violation of the Fourteenth Amendment to the Constitution of the United States.

4. The Supreme Court of the State of Utah erred in not holding that Chapter 12, Title 80, Revised Statutes of Utah, 1933, as herein sought to be applied was valid.

## ARGUMENT

### I.

### The Law Prior to First National Bank of Boston v. Maine

Chapter 12, Title 80, Revised Statutes of Utah, 1933,[1] commonly called the Utah Inheritance Tax Law, in reality imposes an estate tax upon the transfer of the net estate of a decedent. *State Tax Commission* v. *Backman,* (1936) 88 Utah 424, 55 Pac. (2d) 171.

The gross estate, from which, after allowance of certain deductions, the net estate is derived, includes "all property * * * within the jurisdiction of this state, and any interest therein, whether tangible or intangible, which shall pass to any person * * * by testamentary disposition or by law of inheritance or succession of this *or any other state or country* * * *". (Section 80-12-3, Revised Statutes of Utah, 1933.) The tax is placed upon "the transfer of the net estate of every decedent, *whether a resident or nonresident of this state.*" (Section 80-12-2, Revised Statutes of Utah, 1933.) (Italics ours.)

Prior to the decision of this Court in *First National Bank of Boston* v. *Maine,* (1932) 284 U. S. 312, 76 L. ed. 313, 52 S. Ct. 174, the State of Utah levied and collected its estate tax upon the transfer of stock in Utah corporations whether owned by resident or nonresident decedents. *Larson* v. *MacMiller,* (1920) 56 Utah 84, 189 Pac. 579; see also the decision of the Supreme Court of Utah in the instant case, 116 Pac. (2d) 926.

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[1] See Appendix A.

The statutory provisions under which such transfers were taxed by the State of Utah prior to the First National Bank case have remained unchanged to the present time so far as material to the question herein presented (see decision in instant case, 116 Pac. (2d) 926) and are intended to tax transfers such as those in the case at bar if such tax be not violative of the Constitution of the United States.

The position of the State of Utah in so taxing such transfers was in complete harmony with the unanimous decisions of all state courts of last resort which had ruled upon the question. *Greves* v. *Shaw,* (1899) 173 Mass. 205, 53 N. E. 372; *In re Bronson,* (1896) 150 N. Y. 1, 44 N. E. 707; see collection of cases from state courts in annotation at 42 *A. L. R.* 365, *et seq.* There is no decision from any court, under statutory provisions comparable to those of Utah, to the contrary prior to *First National Bank of Boston* v. *Maine, supra.*

Even this Court, prior to the First National Bank decision, had on many occasions recognized the right and power of the state of incorporation to tax the transfer of stock in domestic corporations whether owned by resident or nonresident decedents. *Maxwell* v. *Bugbee,* (1919) 250 U. S. 525, 63 L. ed. 1124, 40 S. Ct. 2; *Frick* v. *Pennsylvania,* (1925) 268 U. S. 473, 69 L. ed. 1058, 45 S. Ct. 603; *Rhode Island Hospital Trust Company* v. *Doughton,* (1926) 270 U. S. 69,70 L. ed. 475, 46 S. Ct. 256; see also *Blackstone* v. *Miller,* (1903) 188 U. S. 189, 47 L. ed. 439, 23 S. Ct. 277; *Baker* v. *Baker, Eccles & Company,* (1917) 242 U. S. 394, 61 L. ed. 386, 37 S. Ct. 152; *Corry* v. *Baltimore,* (1905) 196 U. S. 466, 49 L. ed. 556, 25 S. Ct. 297.

The cases of *Farmers Loan & Trust Company* v. *Minnesota,* (1930) 280 U. S. 204, 74 L. ed. 371, 50 S. Ct. 98; *Baldwin* v. *Missouri,* (1930) 281 U. S. 586, 74 L. ed. 1056, 50 S. Ct. 436; and *Beidler* v. *South Carolina Tax Commission,* (1930) 282 U. S. 1, 75 L. ed. 131, 51 S. Ct. 54, are not opposed to the position herein contended for by your petitioners. Those cases all involved evidences of *debts* —

bonds, notes and open accounts. There is a definite, real and substantial difference between stocks, on the one hand, and bonds, or other evidences of debt, on the other. *In re Bronson, supra;* annotation at 42 *A. L. R.* 355, *et seq.*, especially at 357. This distinction was recognized and carefully applied prior to *First National Bank of Boston* v. *Maine, supra.* Compare *Larson v. MacMiller, supra,* to *McLaughlin* v. *Cluff,* (1925) 66 Utah 245, 240 Pac. 161. The decision in the First National Bank case failed to apply this long recognized distinction.

## II.

### First National Bank of Boston v. Maine Should Be Reconsidered by this Court

For the reasons and upon the grounds and authorities set forth in Point I hereunder, as well as other bases to be hereinafter enumerated, it is submitted that the majority decision of this Court in *First National Bank of Boston* v. *Maine, supra,* should be reconsidered. That decision failed to apply recognized and established principles of law governing taxation by states and misinterpreted the extent of the prohibition contained in the Fourteenth Amendment to the United States Constitution.

The economic or moral wisdom of a tax is properly a subject for legislative, not judicial, consideration. States should be free to tax and to devise methods and subjects of taxation without fear of judicial intervention, so long as such taxing methods and systems are not plainly in violation of the Constitution of the United States. *Newark Fire Insurance Company* v. *State Board of Tax Appeals,* (1939) 307 U. S. 313, 83 L. ed. 1312, 59 S. Ct. 918; *Wisconsin* v. *J. C. Penney Company,* (1940) 311 U. S. 435, 85 L. ed. 222, 61 S. Ct. 246; *Commonwealth* v. *Stewart,* (1940) 338 Pa. 9, 12 Atl. (2d) 444, affirmed by Supreme Court of United States, 312 U. S. 649, 85 L. ed. 389, 61 S. Ct. 445. As recognized in both the majority and dissenting opinions in First National Bank of Boston v. Maine, many states,

prior to that opinion, had enacted reciprocal legislation to avoid multiple taxation of the transfer of shares of stock, as well as other intangibles. See also 53 *Harvard Law Review* 69-70. If First National Bank of Boston v. Maine is law, such legislative enactments become mere vain gestures. We submit that "legislative legislation" is the proper method to meet any objection there may be to such multiple taxation, not "judicial legislation" under the guise of interpreting the Fourteenth Amendment.

Even the majority opinion in the First National Bank case recognized a jurisdiction to tax existent in the state of incorporation. The dissent, of course, is based upon a recognition of such jurisdiction. The majority, however, recognizing also a jurisdiction to tax in the state of the domicil of the owner, felt compelled, by something read into the Fourteenth Amendment against multiple taxation, to decide between the jurisdiction of two states. Therein lies the error of which the dissent complained and to which we take exception.

After making its choice in favor of the state of domicil, the majority opinion then went on in an attempted justification of the choice by arguing that the power to impose death transfer taxes rested upon the power of the state to control the privilege of succession. This, again, was erroneous. *Knowlton* v. *Moore,* (1900) 178 U. S. 41, 44 L. ed. 969, 20 S. Ct. 747.

Regardless of the soundness of that decision, the sole principle upon which it was based has been repudiated by later decisions of this Court. That principle, simply stated, was that the Fourteenth Amendment prohibited more than one state from subjecting the transfer of an intangible to a death duty transfer tax. As stated by Mr. Justice Sutherland in the majority opinion at 284 U. S. 328:

> "We conclude that shares of stock, like the other intangibles, constitutionally can be subjected to a death transfer tax by one state only."

Without that basis, the decision necessarily falls, for, absent that basis, there is no necessity for choosing between two states, each having jurisdiction. That principle has been unequivocally repudiated by this Court in *Curry* v. *McCanless,* (1939) 307 U. S. 357, 83 L. ed. 1339, 59 S. Ct. 900, and *Graves* v. *Elliott,* (1939) 307 U. S. 383, 83 L. ed. 1356, 59 S. Ct. 913.

In *Curry* v. *McCanless, supra,* a resident of Tennessee transferred certain intangibles in trust to an Alabama trustee. At death, both Tennessee and Alabama claimed the right to subject those intangibles to their respective death transfer tax. Each contended for the right to tax to the exclusion of the other, apparently assuming that this Court would continue to apply the rule of First National Bank of Boston. This Court, however, held that *both* states could tax, upon the ground, necessarily, that the Fourteenth Amendment contained no prohibition against two states taxing the transfer at death of the same intangibles.

In *Graves* v. *Elliott, supra,* a New York decedent had retained a power of revocation in connection with a trust of intangibles held by a Colorado trustee. This Court again held that *both* Colorado and New York could tax the transfer at death of the intangibles.

Either the rule of *First National Bank* is law or the rule of *Curry* v. *McCanless* and *Graves* v. *Elliott* is law. Both rules cannot stand, since they are irrevocably irreconcilable. The rule of the latter cases correctly returns to the principle that the Fourteenth Amendment does not prohibit multiple taxation. *Blackstone* v. *Miller,* (1903) 188 U. S. 189, 47 L. ed. 439, 23 S. Ct. 277. The rule announced in the latter cases should prevail. See also *Commonwealth* v. *Stewart, supra; Pearson* v. *McGraw,* (1939) 308 U. S. 313, 84 L. ed. 293, 60 S. Ct. 211; to the same effect see *Van Dyke* v. *Wisconsin Tax Commission,* (1940) 311 U. S. 605, 85 L. ed. 46, 61 S. Ct. 5.

Under the rule of these later cases, the State of Utah, having jurisdiction and freed of the supposed shackles of

the Fourteenth Amendment, may proceed to levy its tax. That the State of Utah has jurisdiction, see cases cited under Point I; see also *Newark Fire Insurance Company* v. *State Board of Tax Appeals, supra; Wisconsin* v. *J. C. Penney Company, supra; Commonwealth* v. *Stewart, supra; Nelson* v. *Sears, Roebuck & Company,* (1941) 312 U. S. 359, 85 L. ed. 522, 61 S. Ct. 586; *Nelson* v. *Montgomery Ward & Company,* (1941) 312 U. S. 373, 85 L. ed. 529, 61 S. Ct. 593.

These later decisions are also in harmony with the concurring opinion of Justice Stone and the dissent of Justices Holmes and Brandeis in *Farmers Loan & Trust Company* v. *Minnesota, supra;* the dissent of Justice Holmes (in which Justices Brandeis and Stone concurred) in *Baldwin* v. *Missouri, supra,* and *Beidler* v. *South Carolina Tax Commission, supra;* the dissent of Justice Stone (joined by Justices Holmes and Brandeis) in *First National Bank of Boston* v. *Maine, supra.* Throughout these dissents runs the same principle that now again finds majority support in *Curry* v.*McCanless* and *Graves* v. *Elliott, supra,* —namely, that the Fourteenth Amendment contains no prohibition against multiple taxation. See also *Cooley* on Taxation, 4th Edition, Sections 223 and 224, also Section 143. A comparative reading of the dissents above noted and the controlling opinion in *Curry* v. *McCanless* demonstrates a remarkable similarity, almost identity, of thought, principle and law.

*First National Bank of Boston* v. *Maine* should, therefore, be reconsidered in the light of later controlling opinions of this Court.

## III.

### This Petition Presents a Question of General Importance which Should Be Decided by this Court

Since 1932, the states have considered themselves barred by the decision in *First National Bank of Boston* v. *Maine*

from attempting to levy a death transfer tax on stock of domestic corporations owned by nonresident decedents because of the rule of that case against multiple taxation. See 53 *Harvard Law Review* 68, 70. The more recent decisions of this Court hereinbefore cited have created doubts as to the present efficacy of the First National Bank of Boston rule. 53 *Harvard Law Review* 68, 71-72. As typical examples of the doubt now existent see *Prentice-Hall,* "Inheritance and Transfer Tax Service", Pennsylvania, paragraph 1012; Oregon, paragraph 1013; West Virginia, paragraph 1001; Arizona, paragraph 201; Utah, paragraph 1009; Vol. I, Reciprocity, paragraph 501. See also annotation at 123 *A. L. R.* 179, especially at pages 197, *et seq.*

In 53 *Harvard Law Review* at page 71 the following appears:

> "The chief importance of the 'trust situs' cases (Curry v. McCanless and Graves v. Elliott) is the possibility that they foreshadow decisions to the effect, among others, that the state in which a corporation is organized may tax the transfer at death of stock in that corporation owned by a nonresident." (Parenthetical insertion ours.)

Under the present state of the law, confusion exists as to the extent of the constitutional power of the states. Taxing authorities are necessarily faced with the problem of enforcing tax legislation as written. Legislative changes which might otherwise be contemplated are of doubtful necessity and efficacy. Orderly administration of revenue measures, protection of state revenues and sources of revenue, as well as the interests of many citizens in making decisions as to investments, all indicate the imperative importance of having the questions raised in this proceeding decided by this Honorable Court at the earliest possible moment.

## CONCLUSION

Petitioners pray that this Honorable Court grant this petition for a writ of certiorari.

Respectfully submitted,

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GARFIELD O. ANDERSON,
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## APPENDIX A.

### Chapter 12, Title 80, Revised Statutes of Utah, 1933, As Amended by Chapter 88, Laws 1935

Section 80-12-2:

A tax equal to the sum of the following percentages of the market value of the net estate shall be imposed upon the transfer of the net estate of every decedent, whether a resident or nonresident of this state:

Three per cent of the amount by which the net estate exceeds $10,000 and does not exceed $25,000;

Five per cent of the amount by which the net estate exceeds $25,000 and does not exceed $75,000;

Eight per cent of the amount by which the net estate exceeds $75,000 and does not exceed $125,000;

Ten per cent of the amount by which the net estate exceeds $125,000; *provided,* at the discretion of the tax commission, the taxpayer may choose to pay in kind on an estate or any portion thereof which is not liquid.

Section 80-12-3:

The value of the gross estate of a decedent shall be determined by including the value at the time of his death of all property, real or personal, within the jurisdiction of this state, and any interest therein, whether tangible or intangible, which shall pass to any person, in trust or otherwise, by testamentary disposition or by law of inheritance or succession of this or any other state or country, or by deed, grant, bargain, sale or gift made in contemplation of the death of the grantor, vendor or donor, or intended to take effect in possession or enjoyment at or after his death.

Section 80-12-9:

Where any property belonging to a foreign estate is subject to the payment of the tax herein provided for, such tax shall be assessed upon the market value of such property remaining after the payment of such debts and expenses as are chargeable to the property under the laws of this state, and, in the event that the executor of such foreign estate files with the

clerk of the court in this state having ancillary jurisdiction statements in writing exhibiting the true market value of the entire estate of the decedent, and the amount of indebtedness for which the decedent has been adjudged liable at the time of his death in other jurisdictions, which statements shall be in affidavit form and sworn to by such executor, there shall also be deducted such proportion of the said indebtedness of the decedent from the value of the property within this state as the value of the property within this state bears to the value of the entire estate; *provided*, that in all such cases where the property within this state consists of personal property only, the statements hereinbefore provided for shall also be filed with the state tax commission.

Section 80-12-34:

If an executor shall assign or transfer any corporate stock or obligations standing in the name of a decedent, or in trust for a decedent, liable to tax hereunder, the tax shall be paid to the state tax commission on or before the transfer thereof; otherwise, the corporation permitting its stock or obligations to be so transferred shall be liable to pay such tax, and it is the duty of the state tax commission to enforce the payment thereof.

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# Supreme Court of the United States

**OCTOBER TERM 1941**

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**No. 815**

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THE STATE TAX COMMISSION OF UTAH, and OLIVER G. ELLIS, State Treasurer of the State of Utah,

*Petitioners,*

against

ALVIN UNTERMYER, IRWIN UNTERMYER, and SAMUEL UNTERMYER, 2ND, Executors of the Estate of Samuel Untermyer, Deceased,

*Respondents.*

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## BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The respondents are the Executors of the Estate of Samuel Untermyer, who, at the time of his death, was a resident of and domiciled in the State of New York. This brief is submitted in opposition to a petition by the State taxing authorities of Utah for a writ of certiorari to review an unanimous decision of the Supreme Court of Utah.

The Court decided that stock of the Union Pacific Railroad Company, incorporated in Utah, that was owned by the decedent and acquired and kept by him in New York, is not subject to the Transfer Inheritance Tax (not an estate tax) of Utah.

### The Facts

The "Summary Statement of Matter Involved" as given in the petition omits reference to various important facts in the record.

In addition to the fact that the stockholder was at the time of his death a resident of and domiciled in the State of New York, he initially acquired the certificates in New York (R. 12). The certificates which he purchased were transferred to his name in the State of New York. They were not transferable on any books in Utah. The Union Pacific Railroad Company issued the new certificates to him in the State of New York and the registration of the certificates also occurred in the State of New York (R. 12). The books of the Union Pacific Railroad Company on which, the petition (p. 2) recites, the shares of stock were recorded in the name of the decedent at the date of death, are and have been kept at all times in the State of New York. At no time has the Company had any of its stock books and stock records in Utah (R. 12). The executive offices of the Company are and for many years have been located in the State of New York (R. 12).

At no time did the decedent ever reside or maintain any residence within Utah or conduct any business in Utah. He did not acquire the stock as the result of any business conducted by him within Utah. Neither the certificates of Union Pacific stock nor any other part of the Estate of decedent were at any time physically present within Utah (R. 12).

The Union Pacific Railroad Company operates railroad lines in thirteen states. Its operating revenue both from Utah intra-state business and inter-state business allocable to Utah was 8.97% of its entire gross railway operating revenue. Less than 9% of its total trackage is in that state (R. 13).

The shares of stock were included in the personal estate of the decedent subject to taxation in the State of New York. It is conceded that the plaintiffs will be compelled and required to pay to the State of New York a tax by reason of the death of the decedent on the Union Pacific stock as part of his Estate (R. 11-12).

In 1927, the State of Utah enacted the Uniform Stock Transfer Law, Section 1 of which reads as follows:

> "Title to a certificate and to the shares represented thereby can be transferred only:
>
> (1) By delivery of the certificate indorsed either in blank or to a specified person by the person appearing by the certificate to be the owner of the shares represented thereby; or
>
> (2) By delivery of the certificate and a separate document containing a written assignment of the certificate or a power of attorney to sell, assign or transfer the same or the shares represented thereby, signed by the person appearing by the certificate to be the owner of the shares represented thereby. Such assignment or power of attorney may be either in blank or to a specified person.
>
> The provisions of this section shall be applicable although the charter or articles of incorporation or code of regulations or by-laws of the corporation issuing the certificate and the certificate itself provide that the shares represented thereby shall be transferable only on the books of the corporation or shall be registered by a registrar or transferred by a transfer agent."
>
> (Revised Statutes of Utah, 1933, Sec. 18-3-1.)

Said Act also provides:

> "No attachment or levy upon shares of stock for which a certificate is outstanding shall be valid until such certificate be actually seized by the officer making the attachment or levy, or be surrendered by the corporation which issued it, or its transfer by the holder be enjoined."
>
> (Revised Statutes of Utah, 1933, Sec. 18-3-13.)

## The Question Presented

The actual question presented in this case is not as broad as suggested by the petitioners (Pet. Brief, p. 5). The problem is not the abstract question as to the power of a state to collect a transfer tax upon the transfer at death of shares of stock in corporations organized under its laws, but whether on the facts of this case as a whole, particularly in view of its own Stock Transfer Act, the State of Utah had the power to tax these shares of stock, issued in New York, acquired, kept and owned in New York by a New York resident, and transferred and transferable only in New York.

## The Position of the Respondents

The State of Utah by enacting the Uniform Stock Transfer Act voluntarily yielded its jurisdiction and power over the certificates and permitted them to acquire a property status approximating that of tangible personalty. The result is that the invalidity of the asserted tax derives as much from the accepted doctrines basic to *Frick* v. *Pennsylvania*, 268 U. S. 473 as from those basic to *First National Bank of Boston* v. *Maine*, 284 U. S. 312.

The respondents further contend that no conflict or important question is developed in this case, from recent decisions of this Court permitting taxation of intangibles held in trust by both the state of domicile and another state where both states afforded substantial protection to the trust *res*.

As against the general argument presented in the petitioners' brief for the allowance of the writ, the respondents contend that the situation in the instant case does not in any event warrant reconsideration of *First National Bank of Boston* v. *Maine*, 284 U. S. 312, even assuming that this Court should deem reconsideration thereof to be appropriate.

## ARGUMENT

### POINT I

**No decision of this Court prior to *First National Bank of Boston* v. *Maine* permitted a tax under the circumstances disclosed by this record.**

The consideration of the ability of a state within the "due process" clause to levy inheritance taxes has generated two problems which appear and reappear in the decisions of this court. One of these problems, exemplified by the tax career of intangibles since *Blackstone* v. *Miller,* 188 U. S. 189, is: Does the Fourteenth Amendment prohibit the taxation by two or more states upon the same property or interest in property? The other and more fundamental problem is whether, independently of the "double taxation" doctrine, there is sufficient nexus between the taxing state and the interest in property, or its possessor, and such degree of protection and benefit extended either to the property or to its possessor, that the state can validly levy the tax.

The second question has become especially relevant where a state attempts to tax property included in the estate of a non-resident. Not being the state of domicile and lacking therefore the reciprocal advantage of having granted the broad protection extended by a state of domicile, such a state must and should show (1) (a) that there is some actual property of the non-resident within its borders, or (b) that the non-resident is doing business within its borders, and (2) that the protection given either to such property or such non-resident is not remote, indirect, or merely formal, so that the tax becomes harsh and inequitable and violates the constitutional safeguards of the non-resident.

At page 10 the petitioners cite a series of cases for the alleged proposition that prior to *First National Bank of Boston* v. *Maine* this court had recognized the right and power of a state of incorporation to tax the transfer of stock in domestic corporations whether owned by resident or non-resident decedents.

Not one of these decisions holds that a tax under the instant circumstances would be proper.

In *Maxwell* v. *Bugbee*, 250 U. S. 525, there was no attack made on the validity of the tax on the stock as such, nor was it even claimed that the stock was not within the State of New Jersey, the state of incorporation (see *Maxwell* v. *Bugbee*, 250 U. S. 525, 534). The principal questions there decided were whether the privileges and immunities of residents were denied to non-residents and whether the non-resident had been afforded equal protection of the laws in view of certain provisions of the New Jersey Act.

In *Frick* v. *Pennsylvania*, 268 U. S. 473, the reference to the power of the state of creation was dicta and there was no showing, as in the instant case, that the certificates had been acquired and transferred on books of the corporation maintained exclusively in a state other than the state of incorporation.

The language in *Rhode Island Trust Co.* v. *Doughton*, 270 U. S. 69, repeats the doctrine of *Corry* v. *Baltimore*, 196 U. S. 466, and certain other cases, to the effect that a state of incorporation at the time it grants incorporation or at the time of an extension of charter, may by a special act expressly fix for taxation purposes the situs of the stock to be issued in the incorporating state, so that any stockholder who acquires such stock is put on express notice and thereby consents in advance to the taxing power.

*Blackstone* v. *Miller*, 188 U. S. 189 (to which *Baker* v. *Baker, Eccles & Co.*, 242 U. S. 394, refers) dealt solely with the imposition of a tax by a state in which the non-resident had deposited some $4,000,000 with a trust company located in such state, which thereby directly owed the monies to the non-resident.

## POINT II

**No subsequent decisions of this Court have challenged the result of *First National Bank of Boston* v. *Maine*.**

*First National Bank of Boston* v. *Maine* has been frequently cited with approval in decisions of this court which have followed or accepted the general doctrine that multiple taxation of the same interest in property by various states represents harshness and inequity sufficient to warrant unconstitutionality.

In these cases, dealing either with that proposition or the related proposition that there is only a single true situs for an intangible, *First National Bank of Boston* v. *Maine* has been cited with approval.

See:

*Burnet* v. *Brooks*, 288 U. S. 378, 401, 402.

*Worcester County Co.* v. *Riley*, 302 U. S. 292, 298:

"This Court has held that state statutes, construed to impose death taxes upon the intangibles of decedents domiciled elsewhere, infringe the Fourteenth Amendment, and it has accordingly reversed judgments of state courts enforcing such liability. *First National Bank* v. *Maine, supra; Farmers Loan & Trust Co.* v. *Minnesota, supra*" (Opinion by the present Chief Justice).

*City Bank Farmers Trust Co.* v. *Schnader*, 293 U. S. 112, 116.

*Senior* v. *Braden*, 295 U. S. 422, 431.

*Wheeling Steel Corp.* v. *Fox*, 298 U. S. 193, 209.

It has correlatively been cited with approval among cases upholding taxation of intangibles by the state of domicile. See the opinion of the present Chief Justice in *Lawrence* v. *State Tax Commission*, 296 U. S. 276, 280.

The recent decisions of this court in *Curry* v. *McCanless*, 307 U. S. 357, and *Graves* v. *Elliott*, 307 U. S. 383, went no further than to hold that where decedents had created *inter-vivos* trusts and voluntarily placed their property in other states, they thereby enjoyed substantial protection by such other states with respect thereto, resulting in a limited qualification of the theory of single situs in favor of the broader equities inherent in protection. Writing for the majority in *Curry* v. *McCanless*, the present Chief Justice referred to the authority of *First National Bank of Boston* v. *Maine*, as follows at page 363:

> "The doctrine, of recent origin, that the Fourteenth Amendment precludes the taxation of any interest in the same intangible in more than one state has received support to the limited extent that it was applied in *Farmers Loan & Trust Co.* v. *Minnesota*, 280 U. S. 204; *Baldwin* v. *Missouri*, 281 U. S. 586; *First National Bank* v. *Maine*, 284 U. S. 312. Still more recently this Court has declined to give it completely logical application. It has never been pressed to the extreme now urged upon us, and we think that neither reason nor authority requires its acceptance in the circumstances of the present case."

The opinion thus indicates in the strongest possible way that while this court declined to give the general doctrine completely logical application, the decision being made in *Curry* v. *McCanless* was not intended in anywise to disturb the result reached in *First National Bank* v. *Maine*.

These decisions involving the doctrine of protection, require no retroactive extension because of the fortuitous fact of incorporation in some one of our forty-eight states, without more.

The decedent in this case, unlike the decedents in *Curry* v. *McCanless* and *Graves* v. *Elliott*, did not, of course, send his Union Pacific certificates into Utah or transfer them to a trustee in Utah or otherwise localize in Utah the property interests sought to be reached.

## POINT III

**The record in this case does not warrant any attempt at a review of *First National Bank of Boston* v. *Maine*.**

The position of the instant petitioners is much weaker than the taxing authorities of Maine who attempted to levy the tax in *First National Bank of Boston* v. *Maine*.

In that case the greater part of the property of the Massachusetts decedent consisted of shares of stock of the Great Northern Paper Company, a Maine corporation (see 284 U. S. at p. 320) and it was not impossible to suggest that the investments had acquired some kind of situs in Maine. There was no evidence presented that the Maine corporation was mostly engaged in business outside of that state, as distinguished from the instant situation in which the Utah corporation operates in thirteen states and derives most of its income from such other states. There as here Maine levied a transfer tax and not an estate tax.

In *First National Bank of Boston* v. *Maine* there was no evidence presented that any transfer of the stock could be accomplished in any jurisdiction other than the state of incorporation, whereas the stock of Union Pacific Railroad Company is transferable on books maintained exclusively without the confines of the State of Utah.

In the Maine case the record did not show, as here, the exclusivity of the state of domicile with respect to all aspects of the situation, except the one bare fact that the Union Pacific Railroad is organized in Utah.

That there was a single situs to these certificates of stock is neither a fiction nor a theory. By its general policy, and especially by the enactment of the Uniform Stock Transfer Law, the State of Utah has itself brought into being the "physical characteristics" to which the present Chief Justice referred in his dissent in *First National Bank of Boston* v. *Maine*, 284 U. S. 312, 332. By force of the Uniform Stock Transfer Act, the property right ceased to

be a true intangible; the certificates ceased to be mere evidences of obligation or of a property right—the property right was merged into the certificates themselves.

Under the common law and general corporate law as it existed at the turn of this century and for many years thereafter, a share of stock as a *res* for jurisdictional purposes generally was considered to be in the state of incorporation. But under the Uniform Stock Transfer Law the *res* has deserted the state of incorporation.

Thus in *Montfort* v. *Korte,* 100 F. (2d) 615 (C. C. A. 7th, 1938), a trustee in bankruptcy of a record stockholder sued in a district court of Indiana, the state of incorporation, to establish title to the stock, the physical certificates of which had been pledged with a Kentucky bank. The Circuit Court of Appeals held that the action was not maintainable as an action *in rem* and that the title could not be determined in view of the enactment by Indiana of the Uniform Stock Transfer Act.

Conceding the general prior doctrine of jurisdiction over shares of stock in the state of incorporation, the court said (616):

> "It becomes apparent, however, that a distinction has generally been made in states where a Uniform Stock Transfer Act is in effect. Such an act exists in Indiana."

And concluded (617):

> "it is apparent that the situs or *res* of the stock in controversy is in Kentucky rather than Indiana, and that plaintiff's theory that its action is maintainable as one *in rem,* must fail."

To the same effect see also:

> *Iron City Savings Bank* v. *Isaacson,* 158 Va. 609, 628-633, 164 S. E. 520, 526-29.

> Note "Situs of Shares of Stock," 39 Harv. L. Rev. 485-487:

> "An apparent exception to the rule that shares of stock have a *situs* at the domicile of the corporation

> is found where the Uniform Stock Transfer Act is in force. This enactment merges the shares into the certificate so that the state dealing with the certificate has power to affect the shares independently of the state of the corporate domicile. But this power really rests on the will of the state of domicile which by adopting the Transfer Act concedes the jurisdiction over the shares to the state where the certificate is found."

In *Newell* v. *Tremont Lumber Co.*, 161 La. 649, 109 So. 344, a case involving a state inheritance tax statute, the court concluded that the statute did not cover the devolution of stock in a Louisiana corporation owned by a decedent domiciled in Illinois in view of the adoption by Louisiana of the Uniform Stock Transfer Law, saying:

> "For under the provisions of that statute [the Uniform Stock Transfer Law] no *title* to shares of stock in a corporation can be acquired or held by anyone, in any way, adversely to the bona fide *holder* of the certificate of stock duly endorsed. See sections 1, 8, 10 and 13. The *transferable value* of the stock lies therefore wholly *in the certificates;* and thus the certificates are by law made the corporeal or physical representatives of the stock itself, so that, where said certificates are, there also the stock itself is physically located." (Italics by the Court.)

Mr. Justice Holmes had occasion comparatively recently to conclude that the State of New Jersey had under its corporate law so merged the certificate and the share interest itself that determination of its ownership was subject only to the laws of the situs of the certificate. As a result certain German corporations who sued the United States Steel Corporation in New Jersey, the state of its incorporation, to establish their title to stock in that corporation which had been seized by the public trustee in England as enemy property, were held bound by the action of England, the place where the certificates had been found. *Direction der Disconto-Gesellschaft* v. *U. S. Steel Co.*, 267 U. S. 22.

## POINT IV

**The instant case is peculiarly inapropos for an attempt to review *First National Bank of Boston* v. *Maine*, since the Utah Statute is a transfer inheritance tax.**

It is accepted doctrine that a transfer tax is based upon the right of beneficiaries to inherit, as distinguished from the right of a decedent to transmit. Whatever jurisdiction Utah may or may not have had over the decedent or his property and the correlative right of transmission, it must be conceded that the State of Utah could under no possible theory extend its jurisdiction over the beneficiaries or their right to inherit under the laws of the State of New York. As Justice Pratt of the Supreme Court of Utah so aptly stated in his concurring opinion (R. 22):

> "In the present case, the right of transmission is granted by a state other than Utah; and, not only that, but the exercise of that right occurs in that other state. The successful transmission of decedent's interest in the corporation to the heirs or legatees is not contingent upon any law of this state. Utah has not conferred the benefits of that right of transmission."

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In view of all the foregoing circumstances, it is beyond the power of the State of Utah to invoke the single fact of incorporation in Utah to support the imposition of a transfer tax upon a non-resident shareholder with respect to certificates of stock so completely associated and fixed in the state of domicile.

## CONCLUSION

**The petition for writ of certiorari should be denied.**

Respectfully submitted,

EUGENE UNTERMYER,
MITCHELL SALEM FISHER,
*Counsel for Respondents.*

No. 815. STATE TAX COMMISSION OF UTAH ET AL. *v.* UNTERMYER ET AL., EXECUTORS. On petition for writ of certiorari to the Supreme Court of Utah. May 4, 1942. *Per Curiam:* The petition for writ of certiorari is granted and the judgment is reversed on authority of *State Tax Commission of Utah* v. *Aldrich, ante,* p. 174. *Messrs. Grover A. Giles,* Attorney General of Utah, and *J. Lambert Gibson* for petitioners. *Mr. Eugene Untermyer* for respondents. Reported below: 116 P. 2d 926.